No. 80-461

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MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

October Term, 1980

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,
Petitioner,

v.

G.C. MURPHY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief of Respondent in Opposition

Robert H. Stevenson
ANDERSON, MORELAND & BUSH
26th Floor
Centre City Tower
Pittsburgh, Pennsylvania 15222
412 471-3002
Attorney for Respondent
G.C. Murphy Company

QUESTIONS PRESENTED

A group of women sued their employer, international union and local union for back pay, alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964. The employer cross-claimed against the unions for contribution and then concluded a settlement with the plaintiffs. Under the settlement, the employer paid the plaintiffs back pay and attorneys' fees, the plaintiffs terminated the action as to all defendants and the employer preserved its claim for contribution. The questions presented are:

1. May the employer obtain contribution if the settlement is found to be reasonable and the unions are found to be jointly and commonly liable with the employer for the discrimination?

2. If the employer may obtain contribution, are the rules that ordinarily govern such claims in federal courts specially superseded by any procedural provisions of Title VII?

3. If the employer's claim for contribution is subject to any procedural provisions of Title VII, may the international union escape liability therefor because of its omission from the charge plaintiffs filed with the EEOC, even if the omission is found to be harmless?

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OPINIONS BELOW

Respondent concurs with petitioner's references to the opinions below.

JURISDICTION

Respondent concurs with petitioner's statement as to the jurisdiction of this Court.

STATUTORY PROVISION INVOLVED

Respondent concurs with petitioner's statement as to the statutory provision involved, but reproduces below subsection

(g) of Section 706, Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. §2000e-5, to correct certain typographical errors that appeared in the Petition.

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

STATEMENT OF THE CASE

The Material Facts

On July 25, 1969, Joanne Glus, a warehouse employee of Respondent G.C. Murphy Co. ("the Company"), filed a charge with the Equal Employment Opportunity Commission ("EEOC") against the Company alleging that she had been the

victim of sex discrimination in her employment. On September 9, 1969, Glus filed an amended EEOC charge against the Company and "Retail, Wholesale and Department Store Union, Local No. 940, AFL-CIO." Glus filed the amended charge upon the recommendation and with the assistance of the EEOC for the purpose of including her local ("Local 940") and international ("the International") unions as respondents.

The EEOC found probable cause to believe that a violation had occurred and initiated conciliation proceedings in which the Company and Local 940 participated. Monetary settlement proposals were exchanged but no agreement was reached. The EEOC then issued Glus a right-to-sue letter, which did not name the International.

On March 17, 1971, Glus, together with other female employees of the Company's warehouse, instituted this action for back pay against the Company, the International and Local 940, alleging violations of Title VII of the Civil Rights Act of 1964 ("Title VII"). The Company filed a cross-claim against the unions for contribution.

Before trial, the Company reached a monetary settlement with the plaintiffs whereby the action was terminated as to all defendants, but the Company preserved the right to pursue its claim for contribution from the unions.

The First District Court Decision

After trial on the contribution claim, the district court ruled, in pertinent part, that: (1) the court had subject matter jurisdiction over the contribution claim against the International, regardless of whether it was named in the plaintiffs' EEOC charge (Pet. App.[1] 81a); (2) the International was a party to the collective bargaining agreements and participated in their negotiation, execution and implementation (Pet. App.

[1]Appendix to Petition.

81a-87a); (3) the contracts were discriminatory in violation of Title VII (Pet. App. 81a-82a); (4) the Company and the unions were jointly and commonly liable for the discrimination that resulted from their concerted efforts (Pet. App. 91a, 114a, 118a); (5) federal courts have authority to award contribution among Title VII violators (Pet. App. 110a); (6) the settlement was reasonable (Pet. App. 115a); and (7) the unions were commonly liable with the Company for the amount of back pay and attorneys' fees paid under the settlement for violations of Title VII, thereby entitling the Company to contribution from the unions for one-half that amount (Pet. App. 118a-119a).

The First Court of Appeals Decision

The International appealed the Title VII contribution award, and the Third Circuit remanded for further consideration of whether the plaintiffs had perfected their right to sue the International, stating "that the jurisdictional requirements for bringing suit under Title VII should be liberally construed" (Pet. App. 62a). It directed the district court to determine whether the International had been named in the EEOC charge and, if not, whether the charge against Local 940 was sufficient to confer jurisdiction over the back pay claim against the International, enumerating four factors to be considered in making this determination (Pet. App. 64a).

The District Court's Decision on Remand

The District Court found that the EEOC charge included the name of Local 940 but not that of the International (Pet. App. 43a). However, based on its consideration of the four enumerated factors, the Court concluded that the omission of the International was excusable and non-prejudicial and therefore did not defeat jurisdiction over the plaintiffs' claims against the International (Pet. App. 47a).

The Second Court of Appeals Decision

(The Decision from Which Certiorari is Herein Opposed)

The International appealed again, unsuccessfully. Judge Higgenbotham, speaking for the court, concluded that the International's absence from the EEOC proceedings was harmless and affirmed the district court's decision on the jurisdictional issue (Pet. App. 4a-5a).

As to the contribution claim itself, the court held that, while Title VII contains no express provision for contribution and its legislative history appears silent in that regard, "a federal common law right of contribution exists when a defendant charged with a violation of Title VII settles with a plaintiff prior to trial for the full amount of damages and requests contribution from a non-settling co-defendant who is jointly liable" (Pet. App. 14a).

The court based its holding on two principles: (1) there is a federal common law, and (2) in some circumstances federal common law causes of action arise from the interstices of congressional acts (Pet. App. 8a). Respecting this case, the court expressed the view that contribution would help achieve the congressional goals of having both unions and employers bear their share of monetary obligations, encouraging conciliation and settlement and deterring the discrimination prohibited by Title VII (Pet. App. 13a-14a).

Judge Sloviter dissented. She did not question the court's holding that the district court had jurisdiction over the plaintiffs' claims against the International, but disagreed with the majority on the availability of contribution among joint violators of Title VII.

SUMMARY OF ARGUMENT

There is no need for this Court to review the question of Title VII contribution presented here because essentially the

same question is before the Court in *Northwest Airlines, Inc. v. Transport Workers Union.* If the question presented in *Northwest* is not to be considered by the Court, there are a number of reasons why the question presented here should likewise not be reviewed, including a lack of ripeness and the absence of any conflict among the federal courts of appeals.

Whether the inclusion of a union in an EEOC charge is a prerequisite of a claim for contribution is a subsidiary question that is also before this Court in the *Northwest* case. Similarly, if that question is not to be considered by the Court in *Northwest*, it should not be reviewed here because of a lack of ripeness and the absence of a clear conflict between federal courts of appeals.

ARGUMENT

I. THERE IS NO NEED FOR THIS COURT TO REVIEW THE QUESTION OF TITLE VII CONTRIBUTION PRESENTED HERE BECAUSE ESSENTIALLY THE SAME QUESTION IS BEFORE THE COURT IN *NORTHWEST AIRLINES, INC. v. TRANSPORT WORKERS UNION.*

As the International acknowledges in its Petition, this Court has granted certiorari in *Northwest Airlines, Inc. v. Transport Workers Union* (79-1056), where the second question presented is:

> Whether an employer has a right to contribution from a labor union that is directly liable to employees for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, for participating in a discriminatory collective bargaining agreement. [Petition For A Writ of Certiorari, No. 79-1056, p. 2.]

That question is essentially the same as the question presented here, and is similarly coupled with the subsidiary question of whether a union's inclusion in an EEOC charge is a prerequi-

site of a claim for contribution. Thus if the question presented in *Northwest* is to be considered by the Court, there appears to be no need to review the question presented here. If, on the other hand, the question in *Northwest* will not be considered, there are a number of reasons why the question here should likewise not be reviewed.

First, the decision of the Third Circuit does not conflict with any applicable decisions of this Court, of another federal court of appeals or of a state court of last resort.

Second, the question presented is not ripe for decision because it has not been considered by any of those courts, thereby depriving this Court of the views of other appellate courts.

Third, the decision of the court of appeals in this case was not based on any perceived constitutional imperative. Rather, when faced with a statute silent on the question, the court upheld the right to contribution based on its responsibility to define the federal common law and its conviction that a right of contribution would advance the congressional objectives of deterrence, shared responsibility and conciliation and settlement. And as Judge Higginbotham noted, the court was required to decide the question of Title VII contribution because it was properly presented for resolution.

Fourth, the Company maintains that the question was properly decided by the Third Circuit, whose decision is in complete accord with the position advanced by the EEOC as *amicus curiae* before the D.C. Circuit Court of Appeals in the *Northwest* case *(Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO,* 606 F.2d 1350, 1356 (D.C. Cir. 1979)). The decision is consistent with the spirit and intent of Title VII and enhances the accomplishment of its stated goals.

II. THERE IS NO NEED FOR THIS COURT TO REVIEW WHETHER A UNION'S INCLUSION IN AN EEOC CHARGE IS A PREREQUISITE OF A CLAIM FOR CONTRIBUTION BECAUSE THAT SUBSIDIARY QUESTION IS ALSO BEFORE THE COURT IN *NORTHWEST AIRLINES, INC. v. TRANSPORT WORKERS UNION.*

As previously stated, the subsidiary question of whether a union's inclusion in an EEOC charge is a prerequisite of a claim for contribution is before this Court in *Northwest Airlines, Inc. v. Transport Workers Union*. Thus there appears to be no need to review the subsidiary question in this case.

In addition, the paucity of federal appellate decisions on the question demonstrates its lack of ripeness. Moreover, there is no clear conflict among the few decisions that have actually addressed the Question.

The International claims that the Third Circuit's decision in this case conflicts with *LeBeau v. Libby-Owens-Ford Co.*, 484 F.2d 798 (7th Cir. 1973), a Title VII case in which the court upheld the dismissal of an international union not named in an EEOC charge.

There, however, the court was confronted not with a claim for contribution, but with the application of Rule 19 of the Federal Rules of Civil Procedure. The court determined that the international union was not an indispensable party whose absence required dismissal of the action. Unlike this case, in which the court found that the International was actively involved in the negotiation, execution and implementation of the discriminatory collective bargaining agreements, the court in *LeBeau* found no agreement to which the international union was a party.

In *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974), another Title VII case, the court upheld the joinder of an

international union not named in an EEOC charge. The court in *Evans* distinguished the *LeBeau* decision, noting that it was based on a finding that the international union was not an indispensable party.

In this case, the Third Circuit's decision permitted the Company's claim against the International to proceed as part of the original Title VII action, obviating a separate lawsuit. To hold otherwise would merely make accomplishment of the same end more burdensome and time-consuming for the parties and courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. STEVENSON
ANDERSON, MORELAND & BUSH
Attorney for Respondent
G.C. Murphy Company

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